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In The

Supreme Court of the United States

PAUL J. CARMOUCHE, DISTRICT ATTORNEY, 1ST JUDICIAL DISTRICT; ROBERT ROLAND, CHAIRMAN, T.O. PERRY, JR., VICE CHAIRMAN, JOHN W. GREENE, E.L. GUIDRY, JR., R.L. HARGROVE, JR., MICHAEL J. KANTROW, SR., JOSEPH MASELLI, HENRY C. PERRETT, JR., ASCENSION DELGADO SMITH, DOLORES SPIKES, EDWIN O. WARE, III, OF THE LOUISIANA BOARD OF ETHICS AND THE SUPERVISORY COMMITTEE FOR CAMPAIGN FINANCE,

Petitioners,

v.

CENTER FOR INDIVIDUAL FREEDOM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the United States Court of Appeals for the Fifth Circuit err by continuing to adhere to the express advocacy/issue advocacy dichotomy established by *Buckley*, in light of this Honorable Court's pronouncements in *McConnell*?

(2) Did the United States Court of Appeals for the Fifth Circuit err in construing the provisions of Louisiana's Campaign Finance Disclosure Act to require disclosure only when *Buckley*'s magic words are used instead of construing the statute to apply to "electioneering communications" under this Court's decision in *McConnell*?

(3) Did the United States Court of Appeals for the Fifth Circuit have any authority to narrowly construe the provisions of Louisiana's Campaign Finance Disclosure Act to require disclosure only when *Buckley*'s magic words are used?

(4) Did the United States Court of Appeals for the Fifth Circuit err in not certifying a *res nova* state law question to the Louisiana Supreme Court?

PARTIES TO THE PROCEEDING

1. The State of Louisiana; Paul J. Carmouche, District Attorney, 1st Judicial District; Robert Roland, Chairman, T. O. Perry, Jr., Vice-Chairman, John W. Green, E. L. Guidry, Jr., R. L. Hargrove, Jr., Michael J. Kantrow, Sr., Joseph Maselli, Henry C. Perrett, Jr., Ascension Delgado Smith, Dolores Spikes, Edwin O. Ware, III, of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance, represented by:

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATION OF OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	3
STATEMENT OF THE CASE	5
ARGUMENT	8
I. THE DECISION OF THE U.S. FIFTH CIRCUIT IS IRRECONCILABLE WITH THIS HONORABLE COURT'S DECISION IN *MCCONNELL*	8
A. The majority opinion adopted a narrowing construction that is not appropriate in light of this Honorable Court's statements and directives in *McConnell*	14
B. The majority erred when concluding that the *McConnell* Court's holdings have no effect upon the "continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation."	17

TABLE OF CONTENTS – Continued

Page

II. REVIEW BY THIS COURT IS WARRANTED BECAUSE THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE 21

III. THE MAJORITY ERRED IN "FORMULATING A RULE OF CONSTITUTIONAL LAW THAT IS BROADER THAN THE FACTS PRESENTED." 22

IV. THE MAJORITY ERRED BY NOT CERTIFYING A QUESTION OF STATE LAW TO THE LOUISIANA SUPREME COURT CONCERNING THE INTERPRETATION AND APPLICATION OF A PROVISION LOUISIANA'S CAMPAIGN FINANCE DISCLOSURE ACT 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Ashwander v. TVA, 297 U.S. 288 (1936) 22

Bellotti v. Baird, 428 U.S. 132 (1976) 26

Boos v. Barry, 485 U.S. 312 (1988) 19

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Burford v. Sun Oil Co., 319 U.S. 331, 63 S. Ct. 1107 (1943) 25

Chamber of Commerce of the United States v. Moore, 288 F.3d 187 (5th Cir. 2002) 14

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 22, 24

FEC v. Massachusetts Citizens for Life, Inc., 470 U.S. 238 (1986) 10, 11

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 24

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L.Ed.2d 481 (1991) 23

Kastigar v. United States, 406 U.S. 441 (1972) 24

Lehman Brothers v. Schein, 416 U.S. 386, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974) 26

Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885) 22

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

New Orleans Public Service, Inc. v. City of New Orleans, 109 S. Ct. 2506 (1989) 25

Stenberg v. Carhart, 530 U.S. 914 (2000) 19

TABLE OF AUTHORITIES – Continued

Page

United States v. Raines, 362 U.S. 17 (1960) 23

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 25

FEDERAL STATUTES, RULES AND REGULATIONS

2 U.S.C. § 434(e) 9, 10

28 U.S.C. § 1254 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343(a)(3) 1

STATE STATUTES

LSA-R.S. 18:1481 *et seq.* 1

LSA-R.S. 18:1482 ..... 2, 21

LSA-R.S. 18:1483(9)(a) 3

LSA-R.S. 18:1491.6(A) 2

LSA-R.S. 18:1501.1 2

LSA-R.S. 18:1501.1(A) 25, 26

CITATION OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered in this matter on May 11, 2006, Civil Action Nos. 04-30877, 05-30212, 449 F.3d 655 (5th Cir. (La.) May 11, 2006).

Rehearing and Rehearing en Banc was denied by the United States Court of Appeals for the Fifth Circuit on July 11, 2006, ___F.3d ___ (5th Cir. (La.) July 11, 2006).

The opinion of the United States District Court for the Western District of Louisiana, Civil Action No. 04-1785, was entered in this matter on September 2, 2004, denying the Motion for Preliminary Injunction filed by the Center for Individual Freedom.

JURISDICTION

Judgment was entered by the United States Court of Appeals for the Fifth Circuit on May 11, 2006. Rehearing was denied on July 11, 2006.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The jurisdiction of the United States District Court for the Western District of Louisiana was invoked under 28 U.S.C. § 1331 and under 28 U.S.C. § 1343(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Louisiana's Campaign Finance Disclosure Act (LSA-R.S. 18:1481 *et seq.*) ("CFDA") is designed to ensure a

"knowledgeable electorate."[1] It therefore requires complete disclosure of all transactions related to the financing of election campaigns, including the requirement that persons making independent expenditures in excess of $500 file disclosure reports. The statute requiring independent expenditures to be reported states:

> **§1501.1. Reports by persons not candidates or committees**
>
> Any person, other than a candidate or a political committee, who makes any expenditure or who accepts a contribution, other than to or from a candidate or to or from a political committee, shall file reports of all information required by R.S. 18:1491.7 for such person if either said expenditures or said contributions exceed five hundred dollars in the aggregate during the aggregating period as defined for committees. Such reports shall be filed at the same time and shall contain the same information as reports required of political committees by this Part and shall be certified correct as required by R.S. 18:1491.6(A) by the person filing.[2]

The term "expenditure" is defined as follows:

> "Expenditure" means a purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office, for the purpose of supporting or opposing a proposition or question submitted to the voters, or for the

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[1] LSA-R.S. 18:1482.

[2] LSA-R.S. 18:1501.1.

purpose of supporting or opposing the recall of a public officer, whether made before or after the election.[3]

INTRODUCTION

The Center for Individual Freedom (the "Center") brought this action in the United States District Court for the Western District of Louisiana on August 26, 2004, requesting a temporary restraining order enjoining the Louisiana Board of Ethics in its capacity as the Supervisory Committee on Campaign Finance Disclosure, (the "Board") from enforcing provisions of Louisiana's Campaign Finance Disclosure Act ("CFDA"). The Center's complaint challenged the "expenditure" standard established under the CFDA. The Center claims its action is to "vindicate free speech, free association, and due process rights."[4] In reality, the Center's goal is to deprive the public, and more importantly, the electorate of information critical to its decision-making process in the crucial days preceding important judicial elections. This out-of-state organization desires to come into Louisiana and express its views in reference to future undefined and unspecified Louisiana elections (apparently *judicial* elections), "particularly during election periods when the public is most attuned to such discussion."[5] It has every right to do so. However, the citizens of Louisiana have an equally compelling right to know the identity of persons seeking to

[3] LSA-R.S. 18:1483(9)(a).

[4] App. p. 37.

[5] App. p. 38-39.

influence elections, through the expenditure of substantial funds in Louisiana.

The sharply divided opinion of the Fifth Circuit, rejecting the carefully reasoned decision of the District Court, has effectively ignored the pronouncements of this Honorable Court in *McConnell v. FEC*[6] and has imposed on Louisiana (and, by implication, a host of similarly situated state governments) an unwise and unnecessary restriction on the capacity of legislatures to control the essential requirement that those who seek to influence elections disclose the source and identity of contributors of campaign funds.

The majority opinion of the Fifth Circuit departs from the settled law of *McConnell*, rejects its common sense approach to evaluating electioneering, and has invited a spectra of organizations – such as the "Center for Individual Freedom" – to secretly fund political campaigns. The majority opinion of the Fifth Circuit has imposed on Louisiana's government (and other governments with statutes modeled after *Buckley*[7] and *McConnell*) a limitation restricting campaign finance reporting requirements to just those expenditures that overtly exhort voters to "vote for candidate x" or "vote against candidate y." This decision, if allowed to stand, will erode years of hard-fought-for transparency and will undermine governmental requirements that organizations, which wage media campaigns "clearly" and manifestly in support of (or in opposition to) a particular candidate, disclose the identity and source of their funding.

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[6] *McConnell v. FEC*, 124 U.S. 619 (2003).

[7] *Buckley v. Valeo*, 424 U.S. 1 (1976).

It is imperative that candidates and elected officials in Louisiana understand the disclosure requirements and have confidence that their actions are in compliance with those requirements. There is a need for clarity in the arena of Campaign Finance Disclosure Law, especially at this point in time when it has been the subject of great controversy, not only in Louisiana but throughout the United States. After *McConnell*, it was clear that persons engaging in political advertising could no longer easily evade disclosure requirements by avoiding the use of certain phrases, such as "vote for" or "vote against." Candidates, elected officials, and political committees need to know where the lines are drawn. The Fifth Circuit's decision confounds that issue, blurs the lines, and engenders confusion and uncertainty. This decision should therefore be reviewed by this Honorable Court.

STATEMENT OF THE CASE

The Center brought this action in the United States District Court for the Western District of Louisiana on August 26, 2004, requesting a temporary restraining order enjoining the Board from enforcing provisions of Louisiana's Campaign Finance Disclosure Act ("CFDA"). After injunctive relief was denied, the Center chose not to run the proposed ads. The Center's complaint challenged the "expenditure" standard established by Louisiana law; the challenged statute was carefully modeled after the statute in *Buckley* to ensure constitutionality. It named as *Ex Parte Young* defendants the members of the Louisiana Board of Ethics who, sitting as the Supervisory Committee for Campaign Finance, are charged with civil enforcement and construction of the challenged laws.

The Board opposed the proceeding, arguing that the challenged provisions of the CFDA are constitutionally firm, that emergency relief would seriously disrupt the then-impending election, and that there were threshold obstacles to relief. At no time during the proceeding did the Center provide a copy of the advertisements it wanted to run. The District Court denied preliminary injunctive relief, holding the challenged provision "for the purpose of . . . influencing," as used in the Louisiana statute, is *exactly* the same as the language in the *Buckley* statute, validated by the United States Supreme Court.[8] The District Court also found that the interest of the public in knowing who is financing the Center's proposed ad campaign in an election for a seat on Louisiana's highest court far outweighs the Center's interest in hiding the identity of those who seek to influence the important election.[9]

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") then denied the Center's request for a temporary injunction pending appeal stating that they were not persuaded that there was an "adequate showing to warrant" the injunction.[10] The parties then agreed that the District Court could render final judgment on the basis of the preliminary injunction submissions and record. The District Court then dismissed the Complaint, finding that the Center did not show a reasonable likelihood of success on the merits.[11] The Fifth Circuit consolidated the timely appeals from the denial of preliminary relief and from the final judgment dismissing the Center's

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[8] App. p. 33.

[9] App. p. 33.

[10] App. p. 3.

[11] App. p. 3.

Complaint. On May 11, 2006, a majority of the Fifth Circuit panel rendered an opinion affirming the District Court's judgment of dismissal; however, the majority opinion also applied a narrowing construction to provisions of the CFDA, imposing upon the CFDA the Buckley/magic words standard.

The majority opinion went beyond the scope of the issue presented and concluded that "receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle to the CFDA and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the scope of the CFDA to express advocacy, we adopt *Buckley*'s definition of what qualifies as such advocacy."[12] However, as stated in the dissenting opinion, "the majority opinion violates the tenets of the Supreme Court, as reaffirmed in *McConnell*, against the formulation of a constitutional rule broader than the precise facts of the case to which it applies."[13] The Board filed a Petition for Rehearing En Banc. On July 11, 2006, the Board's Petition for Rehearing was denied. The majority's narrowing construction and the Board's belief that this narrowing construction is in direct conflict with the Supreme Court's pronouncements in *McConnell* have prompted the Board to file this Petition for Writ of Certiorari.

There are no evidentiary facts contained in the record as no testimony was taken at either the District Court

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[12] App. p. 17.

[13] App. p. 28.

level or at the appellate level. The case was heard – and decided – on motions, affidavits and arguments.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT IS IRRECONCILABLE WITH THIS HONORABLE COURT'S DECISION IN *MCCONNELL*.

Review by this Court is warranted to maintain uniformity of the Supreme Court's decisions. The majority's opinion is irreconcilable with the pronouncements by this Honorable Court in *McConnell*.

The majority's decision undermines the unambiguous expressions in *McConnell* that the "magic words" test of *Buckley* is "functionally meaningless."[14] A holistic approach needs to be taken and a rule of reason is to be used in determining whether the words are clearly intended to influence an election. It is absolutely essential that an informed electorate know from where financial support for a particular individual's candidacy is coming. Moreover, in a modern society, it is far too easy to disguise express advocacy as issue advocacy. The advertisement may not explicitly exhort voters to vote for a specified candidate, and yet, everyone knows exactly what is intended by a particular ad.

Your Honors in *McConnell* adopted the *Buckley* court's articulation of the important governmental interests for disclosure: "providing the electorate with information, deterring actual corruption and avoiding any appearance

[14] *McConnell* at 689.

thereof, and gathering the data necessary to enforce more substantive electioneering restrictions."[15] The famous quote from Justice Brandeis, used by the *Buckley* court, and applicable here, is:

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

The election process is one in which both sunlight and electric light are needed. The Center should not be allowed to make expenditures without disclosing its activity. Of course, the underlying question is whether the Center wishes to engage in "express advocacy" or "issue advocacy."

As recognized by the Center, *Buckley v. Valeo*, 424 U.S. 1 (1976) must be the starting point of any analysis of a constitutional challenge against a campaign finance statute. However, the Center fails to point out that, in *Buckley*, the United States Supreme Court analyzed the independent expenditure reporting requirements of Section 434(e) of the Federal Election Campaign Act which applied to "[e]very person . . . who makes contributions or expenditures." The definitions of "contributions" and "expenditures" in that federal law, like the definitions in Louisiana law, included the use of money "for the *purpose* of . . . *influencing*" the election of candidates.[16]

The *Buckley* Court construed the definition of "expenditure" to reach "only funds used for communications that

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[15] *McConnell* at 690.

[16] *Buckley* at 77 (emphasis added).

expressly advocate."[17] In upholding the requirement of disclosure of independent expenditures, the Court stated:

> But the disclosure provisions, including §434(e), serve another, informational interest, and even as construed §434(e) increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign-related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. By the same token, it is not fatal that §434(e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, **for disclosure helps voters to define more the candidates' constituencies.**[18]

In *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*")[19] this Honorable Court specifically found that *MCFL*'s publication entitled "Special Edition" constituted *express advocacy* even though it purported to constitute only "issue advocacy." The court stated:

> *Buckley* adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote

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[17] *Buckley* at 80.

[18] *Buckley* at 81 (emphasis added).

[19] 479 U.S. 238 (1986).

> for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc. *Buckley*, supra, at 44, n. 52. Just such an exhortation appears in the "Special Edition." The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. . . . The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The "Special Edition" thus falls squarely within 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.[20]

The most recent proclamation by this Court is its 2003 decision in *McConnell v. FEC*.[21] *McConnell* involved challenges to the new federal campaign law, the Bipartisan Campaign Reform Act of 2002, commonly known as BCRA. In *McConnell*, this Court rejected the concept of "magic words," which evolved from the *Buckley* decision, as being necessary to constitute express advocacy, stating:

> The major premise of plaintiffs' challenge to BCRA's use of the term "electioneering communication" is that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech. Thus, plaintiffs

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[20] *MCFL* at 249-50.

[21] 124 U.S. 619 (2003).

maintain, Congress cannot constitutionally require disclosure of, or regulate expenditures for, "electioneering communications" without making an exception for those "communications" that do not meet *Buckley*'s definition of express advocacy.

That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law. In *Buckley*, . . . [w]e provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' . . . 'defeat,' [and] 'reject,'" id., at 44, n. 52, and those examples eventually gave rise to what is now known as the "magic words" requirement.

* * *

Thus, a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command.

* * *

In short, the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities.

* * *

Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. See *Buckley*, *supra*, at 45. Indeed, the unmistakable lesson from the record in this

> litigation, as all three judges on the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless. [citations omitted] Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less **clearly intended to influence the election.** (Emphasis added.)

It is abundantly clear from this Honorable Court's analysis in the *McConnell* case that it is necessary to consider the effect of an advertisement as a whole to determine if it was designed to **influence an election,** the same language used in the Louisiana definition of "expenditure." The *McConnell* ruling does not support the Center's argument that the Louisiana statutes are unconstitutional. To the contrary, the *McConnell* court recognized the need to go beyond the specific words of an advertisement to determine if the advertisement was intended to "influence an election" and therefore subject to regulation by statute.

The Court in *Buckley* concluded that the test is whether the definition affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching on our most precious freedoms."[22] The *Buckley* Court thus concluded that to preserve the definition of expenditure against invalidation on vagueness grounds, the definition "must be construed to apply only to expenditures for communications that in express terms *advocate*

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[22] *Buckley* at 41.

the election or defeat of a clearly identified candidate for federal office."[23] (Emphasis added.)

The majority opinion, as well as the dissenting opinion, correctly concluded that – as in *Buckley* – the definition of "expenditure" in the CFDA is constitutional. However, the majority opinion ignores the *McConnell* Court's conclusion that there is no need to limit disclosure requirements to express advocacy rather than so-called issue advocacy.[24]

A. The majority opinion adopted a narrowing construction that is not appropriate in light of this Honorable Court's statements and directives in *McConnell*.

After declaring the CFDA's definition of "expenditure" "facially constitutional," the majority opinion went beyond the question posed and asked whether, in light of *McConnell*, the court is required to adhere to the express advocacy/issue advocacy dichotomy set forth in *Buckley*.[25] The majority opinion clearly and correctly states that "the Court held that for purposes of regulating election-related speech, there is no constitutionally mandated line that

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[23] *Buckley* at 44.

[24] *McConnell* at 689.

[25] This Court adhered to the express advocacy/issue advocacy dichotomy in *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 194-95 (5th Cir. 2002). *Chamber of Commerce* was decided prior to *McConnell*. Also, a distinction between *Chamber of Commerce* and the instant case is that in *Chamber of Commerce* the Court was asked to apply Mississippi's definition of expenditure to a specific ad – and whether that known language contained in the ad constituted "express advocacy."

must be drawn between express advocacy and issue advocacy."

However, the majority opinion was incorrect in concluding that the *McConnell* Court has not provided a broad approach to determining when expenditures have been made for the purpose of influencing an election. As stated by Judge Dennis, in the dissenting opinion, *McConnell* flatly rejected the argument that *Buckley* established that the First Amendment absolutely guaranteed the right of persons to anonymously engage in political speech for the purpose of issue advocacy under any and all circumstances. The *McConnell* Court did not adopt the *Buckley* express advocacy limitation and magic word implementation as a freestanding commandment of the First Amendment.

As stated by the *McConnell* Court, and by Judge Dennis in his dissent, disclosure requirements are constitutional because they do not prevent individuals from speaking.[26] *McConnell* clearly indicates that individuals are required to comport with the disclosure requirements of the CFDA under a construction that is no broader than is required by the facts of the case at issue. The Center never made known the content of its "ad." Neither the Board nor the courts below were afforded the opportunity to adjudicate the Board's application of the provisions of the CFDA to the "expenditures" made under either the *Buckley* or *McConnell* decisions. However, the Center admitted that its broadcast would clearly identify one or more candidates and be targeted to the relevant electorate. Arguably, with additional facts made known with

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[26] *McConnell* at 693.

respect to the content of the ad, the Center would be required to abide by the disclosure requirements pursuant to the application of either *Buckley* or *McConnell*.

The majority opinion ignores the Supreme Court's decision in *McConnell* and its application to express advocacy expenditures. *McConnell* upheld challenges to the Bipartisan Campaign Reform Act of 2002, commonly known as BCRA. In order to prevent evasion of disclosure requirements by individuals supporting or opposing a candidate but failing to use the "magic words," BCRA set forth factors, other than the use of the magic words, to be considered when determining if disclosure is required.

As Judge Dennis stated in his dissenting opinion, "[T]he *McConnell* court did not adopt the *Buckley* express advocacy limitation and magic word implementation as a freestanding commandment of the First Amendment. The majority opinion misinterpreted the *McConnell* decision and has misapplied it in engrafting *Buckley*'s limiting construction on the [CFDA]." The majority's "limiting interpretation of the CFDA would be acceptable only under the theory that the court in *Buckley* had constitutionalized the express advocacy limitation and magic words prescription, a constitutional theory that the Court expressly rejected in *McConnell*."

The Court in *McConnell* stated that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." Furthermore, the Court stated that "the First Amendment does not erect such a rigid barrier between express advocacy and so-called issue advocacy . . . [t]hat notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully

distinguish electioneering speech from a true issue ad. See *Buckley, supra*, at 45."[27]

It is clear from the Court's analysis in *McConnell* that it is necessary to consider the effect of an advertisement as a whole to determine if it was designed to **influence an election**, the same language used in the Louisiana definition of "expenditure." The *McConnell* Court recognized the need to go beyond the specific words of an advertisement to determine if the advertisement was intended to "influence an election" and therefore subject to regulation by statute. Contrary to the majority's opinion and consistent with the dissenting opinion, the scope of the CFDA should not be limited to "express advocacy" that contains *Buckley*'s magic words requirement. Any application by the Board consistent with the *McConnell* Court's decision cures any vagueness with respect to constitutional attacks by persons making expenditures that are for the purpose of influencing the nomination or election of candidates for office.

B. The majority erred when concluding that the *McConnell* Court's holdings have no effect upon the "continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation."[28]

The majority agrees that *Buckley*'s magic words requirement is functionally meaningless; however, the

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[27] *McConnell* at 689.

[28] App. p. 28.

majority states that "the [*McConnell*] Court said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation."[29] The majority then concludes that "in light of that silence, we must assume that *Buckley* remains good law in such circumstances." The majority's application of *Buckley*'s "magic words" requirement is based on flawed and partial analysis. Justice Dennis in his dissent disagrees with the majority's analysis. Judge Dennis states:

> The majority's assumption rests precariously on a false syllogism, *viz, McConnell* dealt with an ambiguous statute; the present case deals with an ambiguous statute (according to the majority's necessarily non-authoritative state law interpretation); therefore, nothing *McConnell* says bears upon our narrowing construction of a state statute. Only a moment's reflection is needed to see the fallacy of this sophism. The Supreme Court has developed First Amendment principles that it has applied to determine whether any particular statute is constitutionally ambiguous and in need of a narrowing construction. Therefore, the Court's teachings on the First Amendment in such cases are generally authoritative and binding upon the inferior federal courts regardless of the court's conclusion as to whether the statute in the particular case before it is found to be ambiguous and in need of a narrowing construction. Thus, the majority cannot legitimately disregard the teachings of the *McConnell* Court as irrelevant "assertions," as it seeks to do, simply because the Court determined that the statute in

[29] App. p. 28.

> that case was not ambiguous and the majority has decided the case before us is ambiguous.[30]

The majority simply dismisses this Honorable Court's directives in *McConnell* as inapplicable based upon its determination that the statute at issue is ambiguous, a conclusion that is not supported in fact or in law. The *McConnell* Court did not remain "silent" about "the continuing relevance of the magic words requirement as a tool of statutory construction." To the contrary, the Court, by concluding that the magic words requirement was "functionally meaningless," clearly recognized its ineffectiveness and denounced its continuing application, as explained in detail above.

If a narrowing construction is necessary to cure any defects in the challenged statute, the "readily apparent"[31] construction is the standard established in *McConnell*. The Center admitted in its brief that its broadcasts would clearly identify one or more candidates and be targeted to the relevant electorate. The Center's planned advertisements clearly constitute "electioneering communications" and this Honorable Court has determined that such communications are subject to disclosure. Justice Dennis in his dissent states:

> "[T]he Supreme Court's decision in *McConnell* clearly indicates that the State of Louisiana may constitutionally require the Center to comply with the disclosure requirements of the CFDA

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[30] App. p. 28-29.

[31] *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)). Federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.

> under a construction that is no broader than is required by the precise facts to which it is to be applied in the present case. In this case, the Center asserts that it desired only to engage in issue advocacy, and that the TV and radio advertising it proposed to broadcast during the three weeks prior to the September 18, 2004 Louisiana Supreme Court Associate Justice election, would not have been funded or broadcast for the purpose of influencing the election. But the Center admitted that its broadcasts would clearly identify one or more candidates and be targeted to the relevant electorate. Consequently, the broadcasts that the Center desired to fund fall squarely within a category of speech closely analogous to the definition of "electioneering communication" in respect to which the Supreme Court held that Congress may under the First Amendment require disclosure, *viz.* (1) a broadcast (2) clearly identifying a candidate (3) aired within a specific time prior to election and (4) targeted to the relevant electorate. *McConnell*, 540 U.S. at 194."[32]

The more appropriate standard which should be applied in this matter is the "electioneering communication" standard set out in *McConnell.* Here, the majority opinion adopted a narrowing construction that is not appropriate in light of this Honorable Court's statements and directives in *McConnell* and therefore review by this Honorable Court is warranted.

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[32] App. p. 27.

II. REVIEW BY THIS COURT IS WARRANTED BECAUSE THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

This proceeding should be reviewed by this Honorable Court as it involves a question of exceptional importance; the final resolution of this conflict promises to have a far-reaching and significant impact on Louisiana election laws. The majority's decision – while declaring the operational provisions of the CFDA "facially constitutional" – goes beyond the scope of the facts presented. If allowed to stand, the decision will afford individuals and groups an opportunity to avoid essential disclosures of the amount and identity of the source of the expended funds *if* they craft their ads in such a way as to avoid the "magic words" listed in *Buckley*. This certainly frustrates and unnecessarily limits the true purpose of the CFDA. Such a conclusion ignores the dictates of this Honorable Court in *McConnell*.

The stated purpose of the CFDA is set forth in LSA-R.S. 18:1482:

> The legislature recognizes that the effectiveness of representative government is dependent upon a knowledgeable electorate and the confidence of the electorate in their elected public officials. The legislature, therefore, enacts this Chapter to provide public disclosure of the financing of election campaigns and to regulate certain campaign practices.[33]

The State of Louisiana bears the responsibility of protecting its state elections by enacting and enforcing

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[33] LSA-R.S. 18:1482.

campaign finance disclosure laws which ensure democratic elections free of corruption. The majority's decision unnecessarily restricts the State of Louisiana's ability to provide proper regulation of campaign finance practices by limiting the disclosure of information critical to maintaining a knowledgeable electorate.

This is a case of unparalleled importance involving national interests, as any decision the Fifth Circuit renders which invalidates a Louisiana State statute will invalidate, by precedent, similar state statutes elsewhere. The Louisiana statute was carefully tailored after the federal statute that was the subject of examination in the *Buckley* decision. Louisiana and other states have used the language in *Buckley* to craft disclosure requirements. The decision of the Fifth Circuit will be applicable not only to the Louisiana Legislature, but to legislatures elsewhere. Therefore, review is warranted as the question is of exceptional importance to the State of Louisiana's interest in requiring full and complete disclosure of funds expended to influence the outcome of Louisiana elections.

III. THE MAJORITY ERRED IN "FORMULATING A RULE OF CONSTITUTIONAL LAW THAT IS BROADER THAN THE FACTS PRESENTED."[34]

The majority needlessly narrowed the scope of the CFDA by imposing the *Buckley*/magic words standard; the

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[34] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

same standard which has been overruled by *McConnell*.[35] The Court's narrowing construction undermines the holding in *McConnell* and violates a basic principle of the majority's adjudicatory process, as reaffirmed in *McConnell*:

> "We have long 'rigidly adhered' to the tenet '**never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied**,' *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (citation omitted), for '[t]he nature of judicial review constrains us to consider the case that is actually before us,' *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)."[36]

The Center filed suit to have provisions of the CFDA declared unconstitutional. The District Court dismissed the Center's Petition for Preliminary and Injunctive Relief from enforcement of the CFDA declaring the provisions of the CFDA constitutionally valid. The Fifth Circuit affirmed the District Court's judgment of dismissal. The central issue was therefore disposed of by the Fifth Circuit.

It was unnecessary for the majority, as noted in Judge Dennis' dissent, to "needlessly and most harmfully graft onto the CFDA the *Buckley* magic words of express candidate advocacy, thereby nullifying the CFDA's disclosure requirement except in those rare instances in which

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[35] The Court, in upholding most of its provisions by concluding that the "express advocacy" limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question. *McConnell* at 278, n. 11 (Thomas, J., dissenting).

[36] *McConnell v. FEC*, 540 U.S. 93, 103 (2003) (emphasis added).

political speakers fail to eschew the magic words."[37] "A rule of law unnecessary to the outcome of a case approaches without more the sort of *dicta* which may be followed if sufficiently persuasive but which are not controlling."[38] In the proceedings before the district and appellate courts, the Center not only declines to disclose the text of the advertisements that it apparently seeks to broadcast some day, but declined to reveal (or identify) the particular election in which it seeks to run these advertisements. The Fifth Circuit found that the Center does not have standing to launch a challenge on the application of the CFDA but rather restricts its challenge to a facial attack.[39] In affirming the District Court's ruling that the complained-of provisions of the CFDA were constitutional, it was unnecessary for the majority to opine on the application of the CFDA, thereby, allowing the "as-applied" challenge. The majority has in effect commented on words that have never been spoken.

IV. THE MAJORITY ERRED BY NOT CERTIFYING A QUESTION OF STATE LAW TO THE LOUISIANA SUPREME COURT CONCERNING THE INTERPRETATION AND APPLICATION OF A PROVISION LOUISIANA'S CAMPAIGN FINANCE DISCLOSURE ACT.

This Honorable Court has held that due to concerns for comity and federalism, federal courts should either

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[37] App. p. 30.

[38] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993); *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935); *Kastigar v. United States*, 406 U.S. 441, 454-455 (1972).

[39] App. p. 7.

abstain from deciding federal constitutional issues that are entwined with the interpretation of state law or should certify the questions of state law to the state's highest court for an authoritative interpretation of the law before reaching the merits of the case.[40]

This Honorable Court has continuously recognized that when uncertain questions of law need to be adjudicated, the federal courts should abstain until a state court has addressed the state questions. State courts should provide the authoritative adjudication of questions of state law. As stated by Judge Dennis,[41] the policies underlying abstention clearly support that a federal court should wait for a definitive construction by a state court rather than allowing a facial challenge, as seen in this case, to the constitutionality of a state statute. To determine if LSA-R.S. 18:1501.1(A) of the Louisiana Campaign Finance Disclosure Act is substantially broad, as alleged by the Center, construction and interpretation of LSA-R.S. 18:1501.1(A) is necessary to assess its scope.

The abstention doctrine, however, presently is viewed as cumbersome and problematic and causes delay to the judicial process.[42] An alternative to the abstention doctrine is the use of state certification procedures. As stated by Judge Dennis in his dissenting opinion, "[t]he purpose of certification is to obtain the benefit of an authoritative

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[40] App. p. 20-21 and *Burford v. Sun Oil Co.*, 319 U.S. 334, 63 S. Ct. 1107 (1943); *New Orleans Public Service, Inc. v. City of New Orleans*,109 S. Ct. 2506 (1989), *Burford* at 331; and *Federal Practice and Procedure*, Wright & Miller, p. 75-82 vol. 17A and *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

[41] App. p. 21.

[42] *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

construction from the state's highest court before proceeding to the merits of the dispute. As LSA-R.S. 18:1501.1(A) of the Louisiana Campaign Finance Disclosure Act has not been interpreted by the Louisiana Supreme Court, the state has a right and interest in being provided an opportunity to address such statute before a federal court applies its own interpretation and construction. This would allow a federal court to save "time, energy, and resources and helps build a cooperative judicial federalism."[43]

As correctly stated by Judge Dennis in his dissenting opinion, the meaning of the disclosure provision of the Louisiana Campaign Finance Disclosure Act is *res nova*; the Louisiana Supreme Court has never authoritatively interpreted this statute.[44] The federal court's foray into the complex procedures and regulations in place regarding the CFDA would constitute needless conflict with state regulation and the State of Louisiana should have the right to first authoritatively interpret its own statute. It would wreak untold confusion and uncertainty upon the Board if the federal court was allowed to interpret the construction of the Louisiana Campaign Finance Disclosure Act by imposing such limiting language into the statute's meaning without first giving the Louisiana Supreme Court the opportunity to interpret the disclosure statute's meaning

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[43] *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) citing *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 1744, 40 L.Ed.2d 215, 220 (1974).

[44] App. p. 18.

in connection with the Louisiana Legislature's intent when it promulgated such disclosure law.

CONCLUSION

Significant and important government interests will be compromised if the decision of the Fifth Circuit is not reversed by this Honorable Court. The decision of the Fifth Circuit is in direct contradiction to decisions of this Court. These conflicting decisions emphasize the need to review the decision of the Fifth Circuit which rejects Louisiana's attempt to combat the "pernicious influence" of "sham issue advocacy."[45]

The challenged Louisiana statute was modeled after the language of *Buckley*. Many other states have similar disclosure requirements. The application of the statute should not be subjected to a magic words requirement which was never intended by this Court in *Buckley*, and was expressly overruled by this Court in *McConnell*. This case presents an important federal question which has not been, but should be, settled by Your Honors. Buckley left open the question of what constitutes "express advocacy." It is the Board's contention that *McConnell* answered this question. However, if the Fifth Circuit is correct that *McConnell* is not applicable in this case, then the question has not been answered and the opportunity has now

[45] *McConnell* at 627.

arisen for Your Honors to resolve this important issue of campaign finance disclosure.

Respectfully submitted,

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449 F.3d 655

In the
United States Court of Appeals
for the Fifth Circuit

No 04-30877
Consolidated with
No 05-30212

CENTER FOR INDIVIDUAL FREEDOM,

Plaintiff-Appellant,

VERSUS

PAUL J. CARMOUCHE; ROBERT ROLAND; JOHN W. GREENE; E.L. GUIDRY; R.L. HARGROVE JR.; MICHAEL J. KANTROW; HENRY C. PERRETT, JR.; ASCENSION DELGADO SMITH; DELORES SPIKES; EDWIN O. WARE; T.O. PERRY; JOSEPH MASELLI,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed May 11, 2006)

Before DAVID, SMITH, and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Center for Individual Freedom (the "Center") challenges, on First Amendment grounds, the dismissal of its complaint questioning the constitutionality of certain provisions of Louisiana's Campaign Finance Disclosure Act

("CFDA"). Reading the statute narrowly to avoid constitutional problems, we affirm.

I.

The Center is a nonpartisan, nonprofit § 501(c)(4) corporation whose stated goal is "to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution." Complaint ¶ 3. To further this goal, in advance of the September 18, 2004, primary to fill a vacancy on the Louisiana Supreme Court, the Center desired "to speak to the [Louisiana] public . . . on matters of vital public interest, including . . . criminal law enforcement and sentencing, legal reform, and judicial decision-making." Complaint ¶ 10.

To that end, the Center wanted to finance and run television and radio advertisements that, while not advocating the election or defeat of any candidate, would refer to the positions of the candidates on issues of importance to the Center. Fearing, however, that its advertisements would be deemed as intended to influence an election and that it therefore would be forced to make certain disclosures under the CFDA, the Center opted to refrain from running any ads until the constitutionality of the relevant provisions of the statute could be determined.

On August 24, 2004, the Center sued the District Attorney for the 1st Judicial District of Louisiana and various members of the Supervisory Committee for Campaign Finance of the Louisiana Board of Ethics under the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The defendants (collectively, "the Board") are responsible for implementing and enforcing the CFDA. The Center asserts that certain

provisions of the CFDA violate the First Amendment and are therefore invalid. The Center alleges that at the time it filed its complaint, "planning and development of the contemplated ads [was] well-advanced." Complaint ¶ 10.[1]

The Center sought temporary, preliminary and permanent injunctive relief from enforcement of the CFDA. After a hearing on the motion for preliminary injunction, the district court held that the Center has standing to mount a facial attack but denied preliminary injunctive relief on the ground that the Center has little likelihood of success on the merits because the relevant provisions of the CFDA were equivalent to the provisions of the federal campaign finance statute that had withstood First Amendment challenge in *Buckley v. Valeo,* 426 U.S. 1 (1976).

The Center then sought emergency injunctive relief from this court pending appeal. After we had denied that request, the parties agreed that the district court could render a final judgment on the merits of the complaint on the basis of the record and the submissions made in conjunction with the preliminary injunction motion. For the reasons articulated in its ruling on the preliminary injunction motion, the court dismissed the complaint.

II.

The Board argues that this case is nonjusticiable because the Center lacks standing and because the completion

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[1] Because the Center did not run the ads and make the choice between complying with the CFDA and waiting for the Act to be enforced against it, the Center is asserting a facial, rather than as-applied, challenge to the constitutionality of the statute.

of the relevant election renders the complaint moot. We review all questions of subject matter jurisdiction, including the justiciability issues of standing, ripeness, and mootness, *de novo*.[2]

A.

To have standing, a plaintiff must demonstrate that he has been injured, that the defendant caused the injury, and that the requested relief will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Board argues that the Center lacks standing to contest the constitutionality of the CFDA because the Board never took or threatened to take action against the Center under the statute. Pointing to the highly generalized manner in which the complaint describes the proposed ads, the Board asserts that the Center's belief that it would be held to the disclosure requirements of the CFDA is entirely subjective and insufficient to support standing. The Board contends that without any enforcement action taken against it by the Board, the Center cannot challenge the application of the CFDA.

In *Adams v. Askew*, 511 F.2d 700, 704 (5th Cir. 1975), we noted that "[the plaintiffs] . . . confuse an attack on the constitutionality of a statute on its face with an attack on the statute as applied." The contention that a party cannot challenge a statute as-applied unless the statute has been applied to him is generally correct.[3] Because, however, our

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[2] *See Bissonnet Invs., LLC v. Quinlan*, 320 F.3d 520, 522 (5th Cir. 2003); *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005).

[3] Exceptions include circumstances where third-party standing is appropriate.

task is to decide whether the Center has standing to launch a facial, rather than as-applied, challenge, that tautology is not helpful.

The district court held that the Center has standing to challenge the constitutionality of the relevant provisions of the CFDA on their face. Both its conclusion and its reasoning are sound. It is true that facial challenges are generally disfavored because they "entail a departure from the norms of federal-court adjudication by calling for relaxation of familiar standing requirements to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Sabri v. United States,* 541 U.S. 600, 609 (2004). The *Sabri* Court acknowledged, however, that there are concerns in the First Amendment context that are "weighty enough to overcome our well-founded reticence" regarding facial challenges. *Id.* at 610.

As the district court noted, "[t]he First Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself." Trial Transcript at 84. This assessment is based largely on *Dombrowski v. Pfister,* 380 U.S. 479, 486-87 (1965), in which the Court observed that

> [a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. . . . We have fashioned this exception to

> the usual rules governing standing because of the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute of sweeping and improper application. . . . By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation.

The Court echoed this conclusion in *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 392 (1988), when it stated that "the alleged danger of [the challenged statute] is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."

Controlling precedent thus establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing. The Center states that it "is not willing to expose itself and its staff to civil and criminal penalties and its contributors to disclosure," and thus it "has been forced to refrain from speaking. . . ." Complaint ¶ 15. To satisfy standing requirements, however, this type of self-censorship must arise from a fear of prosecution that is not "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 302 (1979).

The Center "intend[ed] to refer to the position of specific candidates on issues of importance to it." Complaint ¶ 13. In a 1999 advisory letter, the Board stated that "[i]f the message is unmistakable, unambiguous, and suggestive of only one plausible meaning, and if that meaning is an expression of preference of one candidate over another candidate, then the underlying contributions

and expenditures should be reported as otherwise required by applicable provisions of the CFDA."[4] In addition, in a recent opinion imposing a $20,000 fine on the Republican State Leadership Committee, the Board held that the CFDA is applicable where "any viewer of the advertisement would understand, *even without explicit word[s] of express advocacy,* that when taken as a whole and in its factual context, the unmistakable intent of the advertisement was to oppose or otherwise influence [a particular candidate's] election."[5]

Given the Board's interpretation of the CFDA, if the Center pointed out the positions of candidates on issues of importance to it, it would run a nonspeculative risk that the Board would construe its ads as an "expression of preference of one candidate over another candidate" and therefore would prosecute a wilful failure to make the required disclosures. On that basis, the Center's self-censorship constitutes sufficient injury to confer standing to challenge the constitutionality of the CFDA on its face.

The causation and redressability prongs of the standing inquiry are easily satisfied here. Potential enforcement of the statute caused the Center's self-censorship, and the injury could be redressed by enjoining enforcement of the CFDA. The Center therefore has standing to mount its facial challenge.

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[4] La. Bd. of Ethics, Campaign Finance Advisory Op. No. 1999-580 (Sept. 17, 1999).

[5] La. Bd. of Ethics, Campaign Finance Ruling No. 2003-746 (Jan. 13, 2005) (emphasis added).

B.

The Board contends that the Center's claim is moot because the election that gave rise to the complaint has already occurred. Mootness is "the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980). Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot.

There are, however, exceptions to the operation of the mootness doctrine. For purposes of this case, the relevant exception is "the class of controversies capable of repetition, yet evading review." *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 774 (1978). Outside the class action context, the "capable of repetition, yet evading review" exception can be invoked if two elements are met: "(1) [T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975).

Controversy surrounding election laws, including campaign finance regulations, is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course.[6]

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[6] *See Moore v. Ogilvie,* 394 U.S. 814, 816 (1969); *Storer v. Brown,* 415 U.S. 724, 737 n.8 (1974); *First Nat'l Bank,* 435 U.S. at 774; *Norman v. Reed,* 502 U.S. 279, 288 (1992).

Echoing Supreme Court precedent, this court stated in *Morial v. Judiciary Comm'n,* 565 F.2d 295, 297 n.3 (5th Cir. 1977), that "[s]uits challenging the validity of state election laws are classic examples of cases in which the issues are 'capable of repetition, yet evading review.'" The case before us therefore satisfies the first prong of that exception.

With regard to the second prong of the "capable of repetition, yet evading review" inquiry, the Center has stated that it "has spoken out on public issues in Louisiana in the past and plans to do so in the future." Complaint ¶ 3(b). Thus, the Center may again feel the need to censor itself to avoid possible application of the CFDA. The Board does not dispute the Center's assertion regarding its past and likely future activity in Louisiana, and there is no reason to doubt that claim.

Moreover, despite the Supreme Court's reminder that there must be a "reasonable expectation that the same complaining party would be subject to the same action again," *Weinstein,* 423 U.S. at 149, the Court does not always focus on whether a particular plaintiff is likely to incur the same injury. For example, in *Storer,* 415 U.S. at 737 n.8, the Court stated that "[t]he 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections."

Similarly, in *Dunn v. Blumstein,* 405 U.S. 330, 333 n.2 (1972), the Court held that the exception to the mootness doctrine applied despite the fact that the plaintiff would no longer be subject to the challenged statute, because

"[a]lthough [plaintiff] now can vote, the problem to voters posed by the Tennessee residence requirements is 'capable of repetition, yet evading review.'" Thus, even if it were doubtful that the Center would again attempt to engage in election-related speech in Louisiana, precedent suggests that this case is not moot, because other individuals certainly will be affected by the continuing existence of the CFDA.

III.

We review questions of law *de novo*. *See Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 601 (5th Cir. 2000). Because a facial challenge to the constitutionality of a statute presents a pure question of law, we employ that standard here as we examine the merits.

In general, to mount a successful facial attack, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The requirement is different in the First Amendment context, where we recognize the overbreadth doctrine. With regard to facial First Amendment challenges, the challenger need only show that a statute or regulation "might operate unconstitutionally under some conceivable set of circumstances." *Id.*

The provisions of the CFDA relevant to the Center's claim are as follows: Louisiana Revised Statute section 18:1501.1(A) states that

> [a]ny person, other than a candidate or a political committee, who makes any expenditure or who accepts a contribution, other than to or from a candidate or to or from a political committee,

> shall file reports if either said expenditures or said contributions exceed five hundred dollars in the aggregate during the aggregating period defined for committees.

The reports must "contain the same information . . . as reports required of political committees," which includes "the full name and address of each person who has made one or more contributions to and which have been received and accepted by the [individual or group] during the reporting period." LA. REV. STAT. § 18:1491.7(B)(4)(a).

If an individual or organization is required to file a report and fails to do so, the CFDA authorizes civil penalties. *See id.* § 18:1505.4. If the failure to file is knowing, wilful, or fraudulent, the person required to file (either as an individual or representative of an organization) may be fined up to $500 dollars and sentenced to up to six months in prison. *See id.* § 18:1505.6(A)(2).

At the heart of the Center's challenge is the statutory definition of "expenditure." Section 18:1483(9)(a) states that an expenditure is "a purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office." The Center contends that this definition is vague and overbroad because it could be interpreted to reach both express advocacy and issue advocacy. Because disclosure requirements burden protected political speech and subject those who do not comply to civil and criminal penalties, and because the disclosure requirements are triggered, *inter alia,* by "expenditures" in excess of $500, the Center contends that the definition is vague and overbroad and therefore violates the First Amendment.

The Board counters that because the relevant provisions of the CFDA are equivalent to the disclosure provisions in the Federal Election Campaign Act ("FECA") that were upheld in *Buckley,* the CFDA provisions are not facially unconstitutional. We agree, but only by imposing the same limiting construction on the CFDA that the Court employed in *Buckley.*

A.

The challenged provisions are similar to what the Court confronted and upheld in *Buckley.* Section 434(e) of FECA required that

> [e]very person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year . . . file with the [Federal Election] Commission a statement containing the information required by this section.

Buckley, 424 U.S. at 160. In relevant part, FECA defined "expenditure" as "a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice presidential election." *Id.* at 147.

The challengers in *Buckley* "attack[ed] § 434(e) as a direct intrusion on privacy of belief . . . and as imposing very real, practical burdens . . . certain to deter individuals from making expenditures for their independent political speech. . . ." *Id.* at 75. In discussing a similar requirement

within the FECA, the Court agreed that disclosure requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment" and that such requirements must therefore "survive exacting scrutiny." *Id.* at 64.

The Court held, however, that in general, disclosure requirements survive exacting scrutiny because "there are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights], particularly when the free functioning of our national institutions is involved. . . . The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude." *Id.* at 66. In reaching that conclusion, the Court focused on voters' need for information about candidates and their supporters to evaluate the candidates and expose corruption. *Id.* at 66-68.

Nevertheless, with regard to § 434(e), the Court stated that "the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." *Id.* at 76-77. The source of vagueness was the "for the purpose of influencing" language within the definition of expenditure, which gave the provision "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 76, 79. Due process "requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Id.* at 77. Without knowing whether the reporting requirements of § 434(e) were triggered by political advocacy, issue discussion, or both, an individual (or organization) wishing to speak out

could not know whether his contemplated conduct would subject him to criminal sanction if he did not disclose the information required by FECA.

In addition, the Court held that § 434(e) was rendered potentially overbroad by the fact that it could be interpreted to require disclosure when an independent individual or group engages only in issue advocacy. The Court reasoned that if § 434(e) did cover that situation, the connection between the information sought and the governmental interest in promoting clean and well-informed elections "may be too remote." *Id.* at 80.

Rather than striking § 434(e) down as unconstitutional, however, the Court imposed a limiting construction on the statute, bringing it within constitutional bounds by drawing a line between express advocacy and issue advocacy. The Court stated that "we construe 'expenditure' for purposes of [§ 434(e)] . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* Words of express advocacy include terms "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. These are the well-known "magic words."

Given that the CFDA links the disclosure requirements for expenditures made by independent individuals and groups to the same "for the purpose of influencing" language that the Court confronted and upheld in *Buckley,* we can likewise construe the CFDA in a way that saves it from constitutional infirmity. On that basis, the Center fails in its facial challenge to the constitutionality of the disclosure provisions of the CFDA.

B.

The more difficult question, in light of *McConnell v. Fed. Election Comm'n,* 540 U.S. 93 (2003), is whether we must, in circumstances such as this, continue to adhere to the express advocacy/issue advocacy dichotomy that the Court set up in *Buckley* and that we employed in *Chamber of Commerce of the United States v. Moore,* 288 F.3d 187, 194-95 (5th Cir. 2002). In *McConnell* the Court held that for purposes of regulating election-related speech, there is no constitutionally-mandated line that must be drawn between express advocacy and issue advocacy. "Speakers," the Court stated, do not "possess an inviolable First Amendment right to engage in the latter category of speech." *McConnell,* 540 U.S. at 190. The Court further asserted that

> a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

Id. at 192.

The Board contends that *McConnell* eliminates completely the express advocacy/issue advocacy delineation and in its place provides a more holistic, "practical" approach to determining whether expenditures have been made for the purpose of influencing an election and therefore, consistent with the First Amendment, can be subject to regulation. That reading of *McConnell* is incorrect.

McConnell states only that a campaign finance regulation can cover issue advocacy and nevertheless be constitutional so long as the regulation is "closely drawn" to match a "sufficiently important" government interest, *id.* at 135, and is not vague. The Court has not provided a broader approach to determining when expenditures have been made for the purpose of influencing an election.

Instead, the Court has stated that *legislatures* may employ standards other than a bright-line distinction between express and issue advocacy as long as they are precise in regard to the types of activities that will subject an individual or group to regulation. With regard to the particular provision at issue in *McConnell,* for example, the Court held that new FECA § 304(f)(3)'s definition of "electioneering communication" "raises none of the vagueness concerns that drove our analysis in *Buckley,*" because the term

> applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

Id. at 194.

McConnell does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague statute. *See Anderson v. Spear,* 356 F.3d 651, 664-65 (6th Cir. 2004). The flaw in the CFDA is that it *might* be read to cover issue advocacy. Following *McConnell,* that uncertainty presents a problem not

because regulating such communications is *per se* unconstitutional, but because it renders the scope of the statute uncertain.

To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle to the CFDA and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the scope of the CFDA to express advocacy, we adopt *Buckley*'s definition for what qualifies as such advocacy.[7] As so limited, the challenged provisions of the CFDA are facially constitutional.

The judgment of dismissal is AFFIRMED.

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[7] We are aware of the *McConnell* Court's assertions, 540 U.S. at 193-94, that "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad," that "*Buckley*'s magic-words requirement is functionally meaningless," and that "*Buckley*'s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption." Those statements, however, were made in the context of the Court's determination that a distinction between express advocacy and issue advocacy is not constitutionally mandated. The Court said nothing about the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation.

In light of that silence, we must assume that *Buckley* remains good law in such circumstances. If the State of Louisiana agrees with the Court that the magic words requirement is "functionally meaningless," then pursuant to *McConnell* it is free to amend the CFDA in the same way that Congress altered the FECA.

DENNIS, Circuit Judge, dissenting:

Because the majority opinion (1) construes key provisions of the Louisiana Campaign Finance Disclosure Act, La. R.S. 18:1501.1(A) and 18:1483(9)(a), without first certifying the *res nova* state law questions implicated to the state's highest court as urged by the Supreme Court, (2) disregards the Supreme Court's clear holdings in *McConnell v. Federal Election Commission,* 540 U.S. 93 (2003) that (i) the First Amendment permits a campaign disclosure law to require the names and addresses of persons who fund a television or radio broadcast that clearly identifies a candidate within 30 days of a primary and is targeted to the relevant electorate, and (ii) when a federal court imposes a narrowing statutory construction, it must never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and (3) saddles the State of Louisiana with a marginalized and ineffective campaign financial disclosure law that is incongruous with the intent of the Louisiana Legislature and the requirements of the First Amendment, I respectfully dissent.

BACKGROUND

The Center for Individual Freedom (the "Center"), a Virginia non-profit corporation, brought this action under the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201, in the federal district court against the individual members of the Louisiana Board of Ethics to have the Louisiana Campaign Finance Disclosure Act (the "CFDA") either declared unconstitutional on its face or to have the CFDA's disclosure and record-keeping provisions narrowly construed, just as the

Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976), limited the disclosure provision of the Federal Election Campaign Act ("FECA"), to apply only to persons making expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate, *i.e.,* to communications containing express words of advocacy of election or defeat ("magic words"), such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 44, n.52.

The Center alleges that it desired to finance radio and television broadcasts on "judicial decision-making" issues, *inter alia,* during the last three weeks of a campaign for the September 18, 2004 primary election of an Associate Justice of the Louisiana Supreme Court targeted to the relevant multi-parish district electorate. The Center contends that it was prepared to run television and radio ads referring to the two candidates as illustrating positions for and against its own viewpoint without expressly advocating the election or defeat of either; that it ultimately chose not to do so because it feared that its funding of the broadcasts easily could have been interpreted as expenditures for the purpose of supporting, opposing, or influencing the election of a person to public office, for which the CFDA would have required the Center to disclose and report the names and addresses of its contributors funding the broadcasts; and that the CFDA is unconstitutionally vague and overbroad because it does not clearly guarantee such persons the right to anonymously fund such broadcasts in the most effective way, *viz.,* by advocating their issue positions while referring to candidates illustrating agreement or opposition to those positions in communications targeted to the relevant

electorate during the last few weeks of a primary election campaign.

The majority grants the Center's request to graft *Buckley*'s limiting magic words construction on to the CFDA. The majority's reasoning is that: (1) the CFDA is vague because it requires disclosure when persons make expenditures for the purpose of influencing the election of a person to public office similar to the FECA provision that the Supreme Court found vague and in need of the limiting construction imposed in *Buckley*; (2) the Supreme Court in *McConnell* held that the Bipartisan Campaign Reform Act of 2002 (the "BCRA")' s definition of "electioneering communication" as a disclosure trigger was not vague because it consisted of easily understood and objectively determinable components, *viz.*, expenditure funding of (i) a broadcast (ii) clearly identifying a candidate (iii) aired within a specific time period (iv) and targeted to the relevant electorate; (3) therefore, *McConnell* has no application whatsoever, express or implicit, to a case involving a vague statute like the CFDA; (4) "To cure [the CFDA's] vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle to the CFDA[.]"

DISCUSSION

1. Certification

The meaning of the disclosure provision of the CFDA is *res nova*; it has never been authoritatively interpreted by the Louisiana Supreme Court. Although federal courts generally have a duty to adjudicate federal questions properly before them, the Supreme Court has long recognized that concerns for comity and federalism may require

federal courts to either abstain from deciding federal constitutional issues that are entwined with the interpretation of state law or certify the questions of state law to the state's highest court for an authoritative interpretation of them before reaching the merits of the cases. In *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941), the Court held that where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions. *See also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37 (1984). This doctrine of abstention acknowledges that federal courts should avoid the unnecessary resolution of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law. Attention to the policies underlying abstention makes clear that in the circumstances of these cases, a federal court should await a definitive construction by a state court rather than precipitously indulging in a facial challenge to the constitutional validity of a state statute. The First Amendment overbreadth doctrine allows a challenge to the validity of a statute on its face only if the law is substantially overbroad. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799-801 (1984); *New York v. Ferber*, 458 U.S. 747, 769-73 (1982). Thus, analysis of the constitutional claims advanced by the Center necessarily requires construction of the CFDA to assess its scope. *Id.* at 769, n.24; *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 618, n.16 (1973). ("[A] federal court must determine what a state statute means before it can judge its facial constitutionality"; application of the overbreadth doctrine is "strong medicine" and is "employed by the Court sparingly"). Where provisions of a state statute have never been construed or applied by the state's highest

court, it seems rather obvious that interpretation of those statutory provisions by that court could substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution. *See Harman v. Forssenius,* 380 U.S. 528, 535 (1965) (explaining that abstention may be necessary where the statute at issue is "subject to an interpretation which will render unnecessary or substantially modify" this Court's decision once the state court has been allowed to construe the statute).

The United States Supreme Court has encouraged the use of state certification procedures as an alternative to "the more cumbersome and . . . problematic abstention doctrine." *See Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 397 (1988). The purpose of certification is to obtain the benefit of an authoritative construction from the state's highest court before proceeding to the merits of the dispute. The state court's interest in accepting a certified question for review is particularly strong when it has not yet had the opportunity to interpret the pertinent statutory language. *Id.* at 397. Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and help[] build a cooperative judicial federalism." *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974); *see also Bellotti v. Baird,* 428 U.S. 132, 148 (1976) (to warrant district court certification, "[i]t is sufficient that the statute is susceptible of . . . an interpretation [that] would avoid or substantially modify the federal constitutional challenge to the statute"). Taking advantage of certification made available by a State may "greatly simplif[y]" an ultimate adjudication in federal court. *See Bellotti,* 428 U.S. at 151.

"Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'CONNOR, J., concurring)); *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.") (citing *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 573-74 (1947)). This is especially true in the context of a state campaign finance disclosure law applicable to all state primary and general elections, including those for the Legislature, the Governor, and other Executive Branch officers, as well as the Supreme Court of Louisiana and many other important offices. The State of Louisiana, as well as all of the other United States, has a great interest in promoting genuinely democratic elections to fill its major public offices free from corruption and other undue influences. For these reasons, the Louisiana Supreme Court should have been afforded an opportunity to construe the Louisiana Campaign Finance Disclosure Act in the first instance.

2. *Buckley* Is Out; *McConnell* Is In: Requiring Disclosure Of Expenditures On Electioneering-Type Communications Is Permissible

Unfortunately, the majority not only fails to certify the question of the meaning of the state statute to the state

supreme court, it also proceeds through an incorrect interpretation of federal law to superimpose an erroneous and overly intrusive narrowing construction on the state law.

In *Buckley,* the Supreme Court concluded that the FECA's disclosure requirement, in its effort to be all-inclusive, raised serious problems of vagueness because it applied to every person who made a contribution or expenditure for the purpose of influencing the nomination or election of a candidate for federal office. 424 U.S. at 76-77. Thus, the subjective intent of the contributor was the primary controlling factor in triggering the disclosure requirement. Because almost any contribution funding a political communication, even if made well prior to the election and without mention of any candidate's name, could be deemed to have been made to influence an election, the potential reach of the FECA disclosure provision was extremely broad. Thus, to insure that the reach of the disclosure requirement was not impermissibly broad, the Court construed "expenditure" to reach only funds used for communications expressly advocating the election or defeat of a clearly identified candidate. *Id.* at 44. The Court suggested that there existed "magic words" of express advocacy of election or defeat of a candidate, which were necessary to make communications subject to the disclosure requirement. *Id.* at 44, n.52.

In contrast, the Supreme Court in *McConnell* upheld without limitation the clear and objective BCRA requirement of disclosure of the names and addresses of persons funding an electronic media broadcast made within a 30- or 60-day window prior to a primary or general election, if it clearly identified a candidate and targeted the relevant electorate. 540 U.S. at 105 (explaining that "issues ads

broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy" and "[t]he justifications for regulating express advocacy apply equally to those ads if they have an electioneering purpose, which the vast majority do"). In drafting the BCRA provision, Congress relied on almost 30 years' experience which taught that the *Buckley* "magic words" limitation was functionally meaningless: under *Buckley* political advertisers easily evaded disclosure by simply eschewing use of the magic words; the outcomes of elections were often influenced by enormous sums spent anonymously to fund TV and radio advertising in the final campaign stages; on the other hand, electronic media advertising during such periods that clearly identified a candidate and targeted the relevant electorate rarely, if ever, was funded for any other purpose than to influence elections. *Id.* at 189-94.

Thus, the *McConnell* Court explained, the amount of pure issue electronic media advocacy that might be chilled during a specified campaign homestretch was negligible in comparison with the beneficial effects of public disclosure of the identities of the funders of such electronic electioneering communications. *Id.* at 196 (agreeing that "the important state interests" upheld through disclosure requirements are "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions"). In fact, the *McConnell* Court agreed with the lower court that "disclosure requirements are constitutional because they do not prevent anyone from speaking." *Id.* at 201 (citation omitted). The Court flatly rejected the plaintiffs' argument that *Buckley* established that the First Amendment absolutely

guaranteed the right of persons to anonymously engage in political speech for the purpose of issues advocacy under any and all circumstances. *Id.* at 190-93. The Court explained that in *Buckley* it had merely adopted a narrowing construction of the FECA to avoid a potential constitutional conflict; it did not adopt the Buckley express advocacy limitation and magic words implementation as a freestanding commandment of the First Amendment. *Id.* Moreover, in doing so, the *McConnell* Court reaffirmed that it had long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, *id.* at 192 (citing *United States v. Raines,* 362 U.S. 17, 21 (1960)); and that the nature of judicial review constrains a federal court to consider only the case that is actually before it. *Id.* (citing *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting)).

For these reasons, the majority in the present case has clearly misinterpreted the *McConnell* decision and has misapplied it in engrafting *Buckley*'s limiting construction on to the Louisiana Campaign Finance Disclosure Act. Assuming, without deciding, that the majority has correctly guessed how the Supreme Court of Louisiana would interpret the CFDA, and that the CFDA is unconstitutionally vague as so construed, it clearly does not follow that the majority has adopted a narrowing construction that is appropriate in the light of the Supreme Court's holdings and teachings in *McConnell.* On the contrary, the majority's limiting interpretation of the CFDA would be acceptable only under the theory that the Court in *Buckley* had constitutionalized the express advocacy limitation and

magic words prescription, a constitutional theory that the Court expressly rejected in *McConnell.*

Instead, the Supreme Court's decision in *McConnell* clearly indicates that the State of Louisiana may constitutionally require the Center to comply with the disclosure requirements of the CFDA under a construction that is no broader than is required by the precise facts to which it is to be applied in the present case. In this case, the Center asserts that it desired only to engage in issue advocacy, and that the TV and radio advertising it proposed to broadcast during the three weeks prior to the September 18, 2004 Louisiana Supreme Court Associate Justice election, would not have been funded or broadcast for the purpose of influencing the election. But the Center admitted that its broadcasts would clearly identify one or more candidates and be targeted to the relevant electorate. Consequently, the broadcasts that the Center desired to fund fall squarely within a category of speech closely analogous to the definition of "electioneering communication" in respect to which the Supreme Court held that Congress may under the First Amendment require disclosure, *viz.* (1) a broadcast (2) clearly identifying a candidate (3) aired within a specific time prior to election, and (4) targeted to the relevant electorate. *McConnell,* 540 U.S. at 194.

3. The Majority Opinion Formulates A Constitutional Rule Broader Than The Facts Of This Case

In order to reduce the scope of the CFDA to a constitutional scale it is only necessary to construe it so as to limit its disclosure requirement to the names and addresses of those who fund electronic media broadcasts, clearly identifying a candidate, aired within three weeks prior to

a primary election, and targeted to the relevant electorate. The majority opinion, however, in disregard of *McConnell,* grafts the *Buckley* express advocacy/magic words limitation on to the CFDA, tacitly formulating and applying a much broader rule that nullifies the CFDA's disclosure requirement in respect to all political speech except for that containing the *Buckley* magic words of express candidate advocacy. Thus, the majority opinion violates the tenet of the Supreme Court, as reaffirmed in *McConnell,* against the formulation of a constitutional rule broader than the precise facts of the case to which it applies.[1]

Consequently, the majority is simply mistaken in assuming that the *McConnell* Court's holdings have no effect upon "the continuing relevance of the magic words requirement as a tool of statutory construction where a court is dealing with a vague campaign finance regulation." The majority's assumption rests precariously on a false syllogism, *viz., McConnell* dealt with an unambiguous statute; the present case deals with an ambiguous statute (according to the majority's necessarily non-authoritative state law interpretation); therefore, nothing *McConnell* says bears upon our narrowing construction of a state statute. Only a moment's reflection is needed to see the fallacy of this sophism. The Supreme Court has developed First Amendment principles that it has applied to determine whether any particular statute is constitutionally ambiguous and in need of a narrowing construction. Therefore, the Court's teachings on the First Amendment

[1] Although the majority does not disclose the constitutional rule supporting its narrowing construction of the CFDA, the majority must have tacitly formulated such a rule. For without a constitutional rule as a basis this court has no authority to narrowly construe state statutes.

in such cases are generally authoritative and binding upon the inferior federal courts regardless of the court's conclusion as to whether the statute in the particular case before it is found to be ambiguous and in need of a narrowing construction. Thus, the majority cannot legitimately disregard the teachings of the *McConnell* Court as irrelevant "assertions," as it seeks to do, simply because the Court determined that the statute in that case was not ambiguous and the majority has decided the case before us is ambiguous.

Therefore, the majority erred in concluding that it must "continue to adhere to the express advocacy/issue advocacy dichotomy that the Court set up in *Buckley* and that we employed in *Chamber of Commerce of the United States v. Moore,* 288 F.3d 187, 194-95 (5th Cir. 2002)." Further, as Justice Thomas aptly recognized, the *McConnell* Court, "by concluding that the 'express advocacy' limitation derived by *Buckley* is not a constitutionally mandated line, has, in one blow, overturned every Court of Appeals that has addressed this question" including, *inter alia, Chamber of Commerce of the United States v. Moore, supra.,* on which the majority erroneously relies. 540 U.S. at 278, n.11 (Thomas, J., dissenting)

CONCLUSION

For these reasons, I respectfully dissent. The majority erred in refusing to certify the *res nova* state law questions implicated in the interpretation of the CFDA to the Louisiana Supreme Court. The majority further erred in disregarding the holdings and teachings of *McConnell* which require, at the most, limiting the CFDA's disclosure requirement to a category of political speech analogous to

that defined as "electioneering communication" by Congress in the BCRA that the *McConnell* Court upheld. Finally, the majority erred needlessly and most harmfully in grafting on to the CFDA the *Buckley* magic words of express candidate advocacy, thereby nullifying the CFDA's disclosure requirement except in those rare instances in which political speakers fail to eschew the magic words. Ultimately, I believe that this case would be more properly decided by the Louisiana Supreme Court. For these reasons, I respectfully dissent from the majority's decision.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CENTER FOR INDIVIDUAL FREEDOM	CIVIL ACTION NO. 04-1785
	JUDGE S. MAURICE HICKS, JR.
VERSUS	
PAUL CARMOUCHE, ET AL	MAGISTRATE JUDGE PAYNE

JUDGMENT

(Filed Sept. 2, 2004)

This matter is before the Court on Plaintiff's, Center for Individual Freedom's ("The Center"), Motion for Preliminary Injunction [Doc. 2] pursuant to Fed. R. Civ. P. Rule 65. The Center moved for injunction to protect its first amendment right to free speech against Louisiana's allegedly unconstitutional campaign finance statutes.

After reviewing the entire record, oral arguments, and its own independent research of the issues, the Court finds that the Plaintiff does not have a reasonable likelihood of success on the merits and that a preliminary injunction is not proper at this time. Therefore:

IT IS ORDERED that Plaintiff's Motion for Preliminary Injunction [Doc. 2] shall be DENIED.

Shreveport, Louisiana, September 2, 2004

/s/ S. Maurice Hicks, Jr.
S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CENTER FOR INDIVIDUAL FREEDOM	*	Civil Action No. 5:04-1785
VERSUS	*	September 2, 2004
PAUL J. CARMOUCHE, et al.	*	9:00 a.m. Shreveport, Louisiana
* * * * * * * * * * * * * * * * * * * *	*	

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Certified transcript of proceedings held before the Honorable S. Maurice Hicks, Jr., United States District Judge.

Reported By: Marie Moran Runyon, RMR, CRR
Federal Official Court Reporter
300 Fannin Street, Room 4212
Shreveport, Louisiana 71101
Phone: (318) 222-9203

PROCEEDINGS PRODUCED BY MECHANICAL STENOGRAPHY AND TRANSCRIBED BY COMPUTER.

* * *

[88] of law, nor is it a new law, such as those presented in other cases, including Ashcroft vs. ACLU and Arizona Right to Life Political Action Committee vs. Bayless, B-A-Y-L-E-S-S.

The Court is not saying that because this statute has not been previously challenged or that because it has not been previously challenged that it is valid, only that similar statutes have in fact been tested through the litigation process.

The Court does not believe that the plaintiff has shown how this Louisiana statute or this set of Louisiana statutes as written is distinguishable from the other statutes that have been interpreted and whose wording has been upheld. The language used in the Louisiana statute is patterned after and is identical to the language used and actually approved in Buckley.

Moreover, the Supreme Court, both in Buckley and McConnell, as well as numerous other cases, has held that there is a substantial public interest in knowing who is behind certain types of political communications. Disclosure laws on independent expenditures – and that's in quotes – have been upheld in these cases. Extensive factual findings have already been made on this specific issue by the courts and no further factual finding is needed here in terms of interpreting the language of the statutes.

The McConnell case held that a clear, bright line

* * *

In the
United States Court of Appeals
for the Fifth Circuit

No. 04-30877
Consolidated with
No. 05-30212

CENTER FOR INDIVIDUAL FREEDOM,

Plaintiff-Appellant,

VERSUS

PAUL J. CARMOUCHE; ROBERT ROLAND;
JOHN W. GREENE; E.L. GUIDRY; R.L. HARGROVE, JR.;
MICHAEL J. KANTROW; HENRY C. PERRETT, JR.;
ASCENSION DELGADO SMITH; DOLORES SPIKES;
EDWIN O. WARE; T.O. PERRY; JOSEPH MASELLI,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
No. 5:04-CV-1785-SMH-RSP

(Filed Jul. 11, 2006)

ON PETITION FOR
REHEARING EN BANC
(Opinion 449 F.3d 655
(5th Cir. May 11, 2006))

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is

DENIED. Judge Dennis dissents from the denial of panel rehearing for the reasons assigned in his dissent from the opinion of the panel majority. No member of the panel or judge in regular active service and not disqualified having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Shreveport Division

CENTER FOR INDIVIDUAL FREEDOM,

Plaintiff,

v.

PAUL J. CARMOUCHE, District Attorney, 1st Judicial District;

ROBERT ROLAND, Chairman of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

T.O. PERRY, JR., Vice-Chairman of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

JOHN W. GREENE, of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

E.L. GUIDRY, JR., of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

Case No. _____

Judge: _____

Defendants, continued:

HENRY C. PERRET, JR., of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

ASCENSION DELGADO SMITH, of the Louisiana Board of Ethics and the Supervisory Committee

R.L. HARGROVE, JR., of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

MICHAEL J. KANTROW, SR., of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

JOSEPH MASELLI, of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

for Campaign Finance;DOLORES SPIKES, of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

EDWIN O. WARE, III, of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance;

Defendants.

COMPLAINT

Nature of the Action

1. This action seeks to vindicate free speech, free association, and due process rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Louisiana Constitution. Plaintiff Center for Individual Freedom ("Center") wants to address citizens of Louisiana on matters of public importance, and many in Louisiana want to hear what the Center has to say. Yet, at the very time when the public is most interested in and attuned to such discussion because of the impending September 18 primary election, Louisiana's campaign finance statutes make it impossible for the Center to speak, threatening civil and criminal penalties for violation of untailored, unduly burdensome, overbroad, and impermissibly vague provisions. Proceeding under the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C.

§ 2201, and the Constitution itself, the Center seeks injunctive, declaratory, and other appropriate relief that will protect the rights to speak and to receive speech. And because irreparable injury is being inflicted on the Center, its supporters, and its would-be listeners at this very moment, the Complaint seeks emergency temporary as well as permanent injunctive relief.

Jurisdiction and Venue

2. Because this action arises under the Constitution and laws of the United States, this Court has federal question jurisdiction under 28 U.S.C. § 1331. Because this action seeks to redress the deprivation of civil rights, this Court also has jurisdiction under 28 U.S.C. § 1343(a)(3). Because a defendant resides in this District and a substantial part of the events or omissions underlying the claim occurred here, venue is proper under 28 U.S.C. § 1391(b).

* * *

Irreparable Injury

28. *But for the challenged laws, the Center would be speaking to Louisiana recipients right now.* Because of the unconstitutional laws, the Center is muzzled and hearers at this moment are being deprived of its speech. Such constitutional deprivations are irreparable injury as a matter of law.

(a) The injury being inflicted here is particularly severe during the narrow window of time just before the impending election in which the public is most interested

in and attuned to discussion of the issues the Center wishes to address.

(b) Persons who wish to receive the speech of the Center are particularly injured because this narrow period before the election is when they may make use of that speech in discourse with others and in assessing the presentations of the candidates.

(c) It is likely that the election for a seat on the Supreme Court of Louisiana will be decided at the open primary on September 18, 2004. Thereafter, the public will experience a period of fatigue related to discourse on issues aired during the campaign. Thus, it is critical that the Center be allowed to engage in public discussion of relevant issues during the few weeks preceding that primary election.

Prayer

WHEREFORE, Plaintiff Center for Individual Freedom requests emergency temporary, preliminary, and permanent injunctive relief from the enforcement of the challenged laws, a declaration that the laws are vague, inadequately tailored, and void, a declaration of the legal

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